# No. 15,054

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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THE UNITED STATES OF AMERICA,
*Appellant,*

vs.

BENJAMIN HARRISON & JONES STEVEDORING COMPANY,
*Appellees.*

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## BRIEF FOR APPELLEE JONES STEVEDORING COMPANY.

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JOHN H. BLACK,
EDW. R. KAY,
HENRY W. SCHALDACH,
233 Sansome Street—10th Floor,
San Francisco 4, California,
*Proctors for Appellee*
*Jones Stevedoring Company.*

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### STATEMENT OF PLEADINGS AND JURISDICTION.

This appeal in admiralty by the United States of America (hereinafter referred to as "the Government") concerns a final decree (R. 36-37) entered on September 14, 1955, against the Government and in favor of the appellee, Benjamin Harrison, in the sum of $2,000, and in the same final decree entered on the same date dismissing the appellee, Jones Stevedoring Company (hereinafter called "Jones").

The libel was filed under the Suits and Admiralty Act and Public Vessels Act, in which the appellee Harrison charged the Government with liability for injuries sustained by him while employed as a long-

shoreman aboard the vessel SS "Private John R. Towle," a public vessel owned and operated by the Government, as a result of the negligence and unseaworthiness of the vessel. The Government, by way of petition (R. 15) under Admiralty Rule 56, sought recovery over against Jones, who, by answer (R. 22) denied all liability to the Government anl all liability to Harrison, excepting that which it had assumed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 901-950.

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**STATEMENT OF THE CASE.**

Inasmuch as the Government, in its statement, has omitted certain significant facts, it becomes necessary on the part of appellee Jones to submit this statement of the case.

On October 14, 1954, appellee Harrison was employed by Jones as a longshoreman, together with other stevedores, to assist in unloading certain jeeps from the vessel SS "Private John R. Towle," which at that time was located at the Port of Benicia on San Francisco Bay (R. 45-62). The gang boss at the time was Christian Jensen (R. 45). There was also a walking boss in charge of the entire operation, employed by Jones, on or about the vessel during the unloading operation (R. 86). Jones did not have a terminal building at the Port of Benicia, and the company was required to bring along its own gear to use in unloading the cargo (R. 77). When the stevedoring gang

went to work the morning of October 14, 1954, the work of unloading was confined to No. 1 hatch, which was open, and the men proceeded to the shelter deck of this hatch to discharge the cargo, which consisted of Army jeeps (R. 46). The jeeps were lashed with wire and it was required that the wires be cut before they could be unloaded from the vessel (R.47).

The stevedoring gang proceeded to discharge the jeeps from the shelter deck and got them all out and then started to uncover the shelter deck so they could get to the deck below to unload the jeeps that were on that deck (R. 49). The strongbacks on the shelter deck were being taken off and placed on the wings on the in-shore side of the vessel (R. 49-50-51). Harrison and his partner had removed three of the four strongbacks and were in the process of lowering and placing in the wing of the shelter deck the fourth strongback when, in an attempt to place the strongback on its side, the beam started to tilt and Harrison started to slip, and the beam fell across Harrison's leg (R. 53).

An accumulation of grease and oil was located in the position where the strongback was being layed to rest, and this caused Harrison to slip, and consequently, caused his leg to be pinned under the strongback (R. 53). Between the time that the longshoremen started to cut the wires holding the jeeps and the time that the actual operation of unloading the jeeps commenced, Jensen, the gang boss, and the walking boss and an officer of the vessel had a conversation concerning sawdust or sand which could be sprinkled on the oil or grease which was located in the wings of the shelter

deck under the jeeps (R. 77-78-86-87-88-91-92-95). The longshoremen were advised by Jensen that they could stop work when they were advised no sawdust or sand was available (R. 87). The commanding officer and the walking boss then came down and talked to the men and told the men that the ship had to go somewhere else to load and was in a hurry, and if the men were careful they could work the vessel and get the ship out of that port and on to another port to load the following day (R. 91-95). The men decided, after talking the matter over with Jensen, to commence work because of the plea of the commanding officer (R. 88). It was about 15 or 20 minutes after the accident that a truck came with sand, which sand had been procured by a member of the Transportation Corps at the Benicia Arsenal from the Sand Blasting Sections of the Ordnance Shop of the Army (R.90).

The stevedoring contract, the basis upon which the Government claims recoupment from Jones (Government's Exhibit "B") provides that the contractor (Jones) shall not be responsible to the Government for, and does not agree to hold the Government harmless from, loss or damage to property or bodily injury to or death of persons:

> (1) If the unseaworthiness of the vessel . . . furnished by the Government contributed jointly with the fault or negligence of the contractor in causing such damage, injury or death and the contractor . . . through the exercise of due diligence, could not otherwise have avoided such damage, injury or death;

(2) If the damage, injury or death resulted solely from an act or omission of the Government or its employees, or resulted solely from proper compliance by officers, agents or employees of the contractor, with specific directions of the contracting officer (R.103).

The trial court held that the appellee Harrison be given judgment in the amount of $2,000 against the Government on the ground that the Government was negligent and that the vessel was unseaworthy (R. 27). It also provided that a decree be entered in favor of Jones against the Government because Jones was not negligent or at fault or in any manner contributing to the injury, in whole or in part, and could not have avoided the injury by the exercise of due diligence (R. 27).

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## QUESTIONS PRESENTED.

1. Should this court grant a trial de novo so as to reconsider all of the evidence which is against the Government's contentions?

2. Where the evidence clearly established the fact that the vessel was unseaworthy and by the exercise of due diligence the injury to Harrison could not have been avoided, can the court grant recoupment against Jones?

3. Where the evidence clearly established that the accident was solely and proximately caused by the unseaworthiness of the vessel and the negligence of the officers of said vessel, can the court grant recoupment

against Jones, whose employee was injured while performing work at the direction of the contracting officer?

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## SUMMARY OF ARGUMENT.

The sole and proximate cause of the accident was the admitted unseaworthiness of the vessel, the condition being caused by oil and grease leaking from the jeeps which were stored in the wings of the shelter deck of the No. 1 hatch of the vessel SS "Private John R. Towle."

There was negligence on the part of the contracting officer in failing and omitting to provide the stevedores with abrasives of some nature, to-wit: sand or sawdust, to cover over the oil and grease when they were advised of the condition by Jones after request by Jones.

The contracting officer was further negligent in failing to provide sand, in view of the admitted fact that sand was available as shown by the testimony of the Government's witness who procured the sand shortly after hearing of the accident to Harrison.

The stevedoring contract provides that where the stevedores have used due diligence, the stevedore is not responsible to the Government by way of indemnity over or contribution, or otherwise, and further that the condition resulted solely from the unseaworthiness of the vessel and the negligence of the contracting officer, which is conclusively established by the evidence in this case.

## THE ARGUMENT.

The finding of the lower court that appellee Jones was not negligent or at any fault in contributing to the injury, in whole or in part, and could not have avoided the injury by the exercise of due diligence and depriving appellant, the Government, of its right to indemnity cannot be set aside unless clearly erroneous.

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### 1. APPELLANT NOT ENTITLED TO A TRIAL DE NOVO.

*McAllister v. United States,* 348 U.S. 19;
*Petterson v. United States,* 224 Fed.2d 748.

This court is limited in the scope of the review by the general rule, in admiralty proceedings, that the findings are not to be disturbed where they are supported by substantial evidence and are not clearly erroneous.

*Kulukundis v. Strand,* 202 Fed.2d 708.

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### 2. THE VESSEL WAS UNSEAWORTHY AND APPELLANT LIABLE IN DAMAGES, BUT THE COURT CANNOT GRANT RECOUPMENT BECAUSE APPELLEE JONES EXERCISED DUE DILIGENCE PURSUANT TO THE CONTRACT.

Where the vessel is unseaworthy and where the contractor has used due diligence, the Government cannot be granted recoupment against Jones. Appellant relies principally on the cases cited in their brief, to-wit:

*United States v. Arrow Stevedoring Co.,* 175 Fed.2d 329;

*United States v. Rothschild International Stevedoring Co.,* 183 Fed.2d 181;

*States Steamship Company v. Rothschild International Stevedoring Co.,* 205 Fed.2d 253;
*Ryan Stevedoring Company v. Pan-Atlantic Steamship Company,* 349 U.S. 901.

These cases are not applicable. The majority of these cases, decided by the Court of Appeals for the Ninth Circuit, have established that while a shipowner may be held liable for damages to an employee of an independent contractor for injury sustained because of unseaworthiness of the vessel, defect in equipment, or failure to supply a safe place to work, the shipowner is entitled to full indemnity from the contractor who, with knowledge of such unseaworthiness, defect, or failure to supply a safe place to work, permits its employee to work there *without taking proper steps to remedy such unsafe condition.* In the instant case, the vessel was admittedly unseaworthy due to the fact of the presence of oil in the wings of the shelter deck. The stevedoring contractor Jones knew of said condition and requested that the Government remedy the situation by the use of sawdust or sand or some other abrasive material. The contractor Jones did not have material available to remedy the situation due to the fact that they were working off an Army dock and did not anticipate running into such a situation and, further, could not with any dispatch have obtained the sand or sawdust, save and except for a trip to San Francisco at their terminal office and return to Benicia. The Government had the materials available on the premises and could have obtained the same within 10 or 15 minutes, as the evidence in this case shows

(by the testimony of Greening). None of the cases cited by appellant is applicable, as we have in this case a different factual situation, to-wit: the exercise of due diligence on the part of the stevedores and the failure of the Government to obtain the necessary material, to-wit: sand and sawdust, and, therefore, even though the vessel be unseaworthy, we have the further fact of the continuing negligence of the Government in failing to correct such condition. Therefore, the unseaworthiness of the vessel and the continuing negligence of the Government was the sole and proximate cause of the injury to appellee Harrison.

If it be argued by appellant, the Government, that irrespective of the terms of the written contract the appellee Jones breached its warranty and was negligent in allowing the stevedores to work, it still has the hurdle of continuing and active negligence on the part of the Government in failing to produce sand or sawdust requested by the stevedores to alleviate the existing negligent or unseaworthy conditions that the stevedores found on their arrival at hatch No. 1. If it be contended by the Government that there was joint negligence on the part of the shipowner and stevedore, then, regardless of the degree of culpability, contribution rather than indemnity would be involved and no recovery is allowed under the doctrine of *Halcyon Lines v. Haen Ship Ceiling and Refitting Corporation,* 342 U.S. 282.

In returning to the contract involved in this matter, it is contended, and rightfully so, by appellee Jones that the stevedoring company did everything in its

power to correct and remedy the unseaworthy condition found by the stevedores at the time they arrived on the job. They used "due diligence" in attempting to correct the unseaworthy condition by requesting the use and application of sand or sawdust. The stevedores had no way of knowing what condition they would run into. The Government, as the evidence showed, had the means of correcting the condition and failed and omitted to do so. This is in accordance with the decision of the lower court and in accordance with the findings of fact and conclusions of law herein and cannot be disturbed on appeal.

Appellee refers to the case of *American Mutual Insurance Company v. Matthews,* 182 Fed.2d 322, and reference is made to this case for the reason that it is illustrative of the basic differences between the right to indemnity and the right of contribution between joint tort feasors. It is shown to the satisfaction of this court that there is no liability under the contract involved because of the due diligence on the part of the appellee Jones in attempting to remedy the unseaworthy condition which was presented to them when they commenced work on the SS "Private John R. Towle". Therefore, assuming for the moment that the appellee Jones was negligent in working the cargo, it must also be assumed that there was continuing negligence on the part of the Government in failing to provide sand and sawdust, after being requested, when the same was available. The *Matthews* case held that since the shipowner joined in the wrongdoing in supplying a defective appliance to the employing steve-

dore who used it (in this case omitting to remedy a condition when the opportunity was apparent to rectify the same), both parties were culpable, and the Government (shipowner) could obtain no indemnity. The negligent shipowner, the Government, is not entitled to a bonus or windfall for his palpable breach of duty to the stevedore. In this regard, see cases from another circuit supporting this position.

*Slattery v. Mara,* 186 Fed.2d 134;
*Shannon v. United States,* 119 Fed.Supp. 706;
*Torres v. Castor,* 1956 A.M.C. 325;
*Hawn v. Pope and Talbot,* 186 Fed.2d 800.

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3. WHERE THE VESSEL WAS UNSEAWORTHY, AND WHERE THE GOVERNMENT FAILED TO PROVIDE NECESSARY PRECAUTIONS AND MATERIALS AFTER REQUEST BY THE STEVEDORE, THE GOVERNMENT CANNOT RECOUP ITS LOSS WHERE THE STEVEDORES WERE PERFORMING WORK AT THE DIRECTION AND REQUEST OF THE CONTRACTING OFFICER.

Again, reference is made to the contract between the Government and appellee Jones and, in particular, Clause 12(b)(2), which states as follows:

> "That the contractor shall not be responsible to the Government for, and does not agree to hold the Government harmless from, . . . bodily injury . . . if the damage or injury resulted solely from an act or omission of the Government or its employees or resulted solely from proper compliance by officers, agents, or employees of the contractor, with specific directions of the contracting officer."

In this regard, appellee Jones incorporates all of its argument under the preceding paragraph herein by reference thereto on the grounds that any damage or injury to appellee Harrison *resulted solely from an act or omission of the Government.*

In any event the injury to appellee Harrison resulted from proper compliance by the stevedore with order and directions made and given by the contracting officer (the Government).

(Testimony of Christian Jensen). (R. 86-87).

"Q. Now, was there anybody else there when you talked to him?

A. Yes, there was the receiving officer, or whoever he was. I don't know. I wasn't introduced to him.

Q. Was he in uniform?

A. That's right.

Q. And he was an officer, is that right?

A. That's right.

Q. You don't know his rank?

A. I don't know what rank he have?

Q. What if any conversation was had between the three of you, the walker, the officer and yourself?

A. I only had conversation with the walking boss.

Q. Was the officer there within hearing of this conversation?

A. That's right.

Q. He was right there?

A. That's right.

Q. What did you say to the walking boss in substance?

A. I asked if we couldn't get some sawdust, sand or any other substance there that you could cut the grease because we needed that or stop working.

Q. Either that or you would stop working?

A. That's right."

(Testimony of Christian Jensen). (R. 88).

"A. They decided they going to stop working.

Q. Oh, I see.

A. But then the commanding officer and the walking boss came out that the ship had to go somewheres else to load, and so on, in a hurry, and why we couldn't work carefully so the ship could get out that day and go down to another port to load the following day.

Q. Now, where did this conversation take place where the officer—Who was it that talked about the ship wanting to get unloaded and get to another port?

A. That's the walking boss.

Q. Was the commanding officer with him at that time?

A. He was standing next to him.

Q. I see, And did you tell the men—go down and tell the men what they said?

A. I went down and talked to them and asked them what their decision would be.

Q. And what was the decision?

A. The decision was that, 'We will continue.' "

It is axiomatic that where one party is requested or directed by another to do certain work, where the directing party knows of the danger or hazard involved, the directing or requesting party cannot thereafter be

heard to say that it wasn't without his fault or negligence.

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### CASES CITED BY APPELLANT.

Appellee Jones has reviewed most of the cases cited herein as authority by appellant and has distinguished them factually, and they are not applicable to the situation at bar. With respect to the contention of the Government that the appellee Jones was "not energetic" in securing proper implements from other sources to remedy the unseaworthy condition, it can only be stated in that regard that the vessel was moored at the Benicia Arsenal, a Government installation, and that the facts of the matter show that within 10 or 15 minutes after the accident, sand was immediately brought aboard the vessel from a Government installation on the shore adjacent to the dock. It is not a question of whether the appellee Jones was "energetic," as stated in the brief of appellant, the Government. It is a question of whether, according to the contract, appellee Jones used "due diligence". Under all the facts and circumstances, as seen by the trial court and determined therein, appellee Jones used due diligence. The cases cited therein by the Government are not in point and not controlling here.

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### CONCLUSION.

The correct statement of the law is that a shipowner is not entitled to claim indemnity where his negligent conduct has been the *sole* cause of the in-

jury. Here the trial court found that the Government was solely at fault in causing the condition and allowing the same to continue after being requested to remedy the same.

The shipowner should not be encouraged to neglect its duty to maintain vigilance to prevent stevedoring accidents due to unseaworthiness or defective ship's gear. By his control of the vessel and circumstances surrounding, the shipowner can eliminate unsafe conditions. The stevedore takes the ship and gear as he finds it. If the stevedore, as was the case here, objects to conditions and requests that the conditions be remedied, and the shipowner fails to do so, having within its power the facilities to remedy the situation, then there is no liability for indemnity over or recoupment against the stevedore.

Dated, San Francisco, California,
August 3, 1956.

Respectfully submitted,
JOHN H. BLACK,
EDW. R. KAY,
HENRY W. SCHALDACH,
*Proctors for Appellee*
*Jones Stevedoring Company.*